

E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “eBay Law”

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A recent Pulitzer Prize winning novel, Steven Millhauser's *Martin Dressler*,¹ tells the story of Martin Dressler, an entrepreneur in the late Nineteenth century in New York City. Dressler makes his fortune in real estate, designing and constructing ever larger and more grandiose buildings in different areas of Manhattan.² Each construction project is intended to be a statement about both design and technology and about employing what were then-emerging technologies such as electricity, in ways that provided inhabitants with an amazing array of resources in one place.³ His career culminates with a project he calls the Grand Cosmo, the most spectacular building ever built and described by an architecture critic as follows:

The Grand Cosmo . . . represented in an extreme form the age's love of the grandiose and the eclectic; it brought together so many clashing elements, in so massive a space, as to produce an impression of confusion, of uncertainty. For what, after all, was the Grand Cosmo? Insofar as it pretended to be a place in which people might wish to live, it was uninhabitable. It seemed to combine elements of the hotel, the museum, the department store, the amusement park, and the theater.⁴

This description of the Grand Cosmo has intriguing parallels to cyberspace, a human creation where architecture and design are indispensable, where any combination of places can be assembled on screen, where larger and more complicated entities continuously replace smaller and

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¹ See generally STEVEN MILLHAUSER, *MARTIN DRESSLER* (1996).

² See *id.* at 1–2, 262.

³ See *id.* at 262–74 (describing the design of the Grand Cosmo).

⁴ *Id.* at 274–75.

simpler “places,” and where, even now, there is some uncertainty about what it really is. Like Dressler’s buildings, cyberspace grows ever larger as electronic representations of libraries, casinos, malls, auction houses, delivery services, museums, amusement parks, and other familiar places appear in electronic form. As it grows larger, however, we are still challenged to understand how to understand and respond to electronic creations and representations. As hyperlinks and software code connect websites to each other, what kind of entity or entities are we creating? In designing dispute resolution functions for this environment, where should we assume power and responsibility are located? Should the online environment be conceptualized as something like a chain of stores or a franchise, where some central authority exercises control and shapes identity? Or should we consider what is being built online as a looser configuration, one where there are relationships and, obviously, the sharing of information, but where power is located in the parts that make up the whole and where there may not even be a whole as we ordinarily understand it?

These questions underlie much of the challenge in various online alternative dispute resolution (ADR) activities being pursued at the Center for Information Technology and Dispute Resolution at the University of Massachusetts (the “Center”). The Center seeks to understand the nature of the online environment and how this environment affects disputes and dispute resolution.⁵ Disputes and dispute resolution do not occur in a vacuum. Every dispute arises in a setting or context, and the setting from which it arises may shape the expectations of the parties, the timing of settlement, the perceived urgency of resolution, the consequences of and available alternatives to failure, the role of the third party, and even the form of dispute resolution.⁶

⁵ See generally *University of Massachusetts, Amherst: Center for Information Technology and Dispute Resolution* (visited Apr. 12, 2000) <<http://www.umass.edu/dispute>>.

⁶ The context of disputes has a significant impact on the process by which they are resolved:

[C]ontext can influence the approach of the neutral, the choice of process, and the behavior and attitudes of disputants. In any environment, context can affect the kinds of disputes that are likely to arise and also affect who the parties are who are likely to be involved in the dispute. Context implicitly feeds us information about the extent or nature of the injury as well as how the injury or dispute is perceived by those involved. Context situates a dispute in a particular time and place, and we react and adjust accordingly as the parameters of the environment become clear to us.

This Article arose out of a project conducted during the spring of 1999 in which we attempted to bring the skills of a trained mediator to disputes arising in the setting of eBay, the largest online auction site on the web.⁷ Our main goal was to ascertain how effective an online mediator could be when interaction occurred without face-to-face meetings. Yet we also recognized that however successful or unsuccessful we were in this process, this would be only the first in many efforts to find appropriate tools and resources for confronting large-scale online conflict. While our short-term aim was to bring satisfaction to those involved in disputed transactions, we also were interested in understanding the background forces affecting the disputes and the disputants, to see what sets of pressures were at work that affected the behavior and decisionmaking of the parties, and to consider whether it was the qualities of particular online institutions where the disputes occurred or cyberspace at large that might need most of our attention as we designed further projects.

In particular, there were two issues, both related to the relationship between law and ADR, that were of concern to us as we collected data about the kinds of disputes that arose at eBay, as follows: how many of them there were and how successful we were in resolving them. The first issue related to the role of and need for ADR, a set of methods that in the offline world are considered alternatives to legalistic modes of dispute resolution. If dispute resolution is related to context, we wondered whether, in the various electronic contexts we were exploring, ADR will continue to be considered the "alternative" or whether there might be reasons to think that ADR will be the process of choice online.

The second issue concerned not legal methods or processes but legal doctrine and substantive law. Alternative dispute resolution often is employed so as to avoid the need to apply existing rules. Settlements using ADR often can be fashioned that are more individualistic and flexible than legal doctrine might allow. Difficult questions of jurisdiction often can be avoided. Yet it is also clear that the law of the jurisdiction in which a dispute has occurred is not totally irrelevant to ADR. It generally is agreed that ADR occurs "in the shadow of the law,"⁸ meaning that negotiation, mediation, and

Ethan Katsh, *The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace* (visited Jan. 31, 2000) <<http://www.umass.edu/dispute/ncair/katsh.htm>>.

⁷ See eBay, Inc., *About eBay: Company Overview* (visited Apr. 12, 2000) <<http://pages.ebay.com/community/aboutebay/overview/index.html>>.

⁸ Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules

arbitration take place with the parties being somewhat aware that law, looming in the background, is a force that should enter into any calculations in how one develops and pursues a strategy for resolution. But where is the law in cyberspace? What is the law? Whose law and jurisdiction apply? Again, these were background questions, not of particular concern to either the parties or the mediator, but of great concern to us since they might be affecting demands of the parties and the willingness of the parties to engage with us at all.

In Part I of this Article, we describe how the pilot project was conducted, how disputants found us, how many and what kinds of disputes we encountered, and how we responded to them. Part II examines the informational processes and strategies typically employed by mediators and identifies ways in which current online resources are constraining and need to be addressed. Part III suggests the direction in which software needs to develop to make online mediators more effective. Part IV analyzes the environment out of which these disputes arose, an environment we came to associate more with eBay than with cyberspace at large. We consider the nature of user participation in the economy of eBay and the regulation of this economy by what might be considered to be "eBay law." We postulate that it is the nature of "eBay law," the law of the individual online marketplace, that may shape opportunities for online ADR in the future and guide the development of online ADR frameworks.

I. MEDIATING EBAY DISPUTES

We were approached in December 1998 by one of the founders of Up4Sale, an online auction site that had been purchased a few months earlier by eBay.⁹ We were informed that eBay was interested in providing a dispute resolution opportunity for its users and asked whether we would be interested in conducting a pilot project to determine whether mediation could be provided effectively for disputes arising out of auction-related transactions. For a period of about a month in early 1999, information about

governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent bargaining chips—an endowment of sorts.

Id.; see also Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225 (1982).

⁹ See *About Up4Sale* (visited Jan. 31, 2000) <<http://www.up4sale.com/about1.htm>> (explaining Up4Sale's purpose and that Up4Sale is owned by eBay, Inc.).

our service and a link to our complaint form¹⁰ was placed on the Up4Sale site. We received an average of two to four disputes a week during this time and began to understand the types of disputes arising out of auction sites and the types of interactions with parties that might be possible.

In late February 1999, we agreed to expand the project to the much larger eBay site.¹¹ Starting in mid-March 1999, a link was placed on the eBay customer service page informing users that they could obtain assistance in transaction-related disputes by clicking on a link to us and filling out a complaint form.¹² eBay did not publicize the link, and the customer service page was two levels down on its site.¹³ Even so, during a two week period, 225 buyers and sellers found the link and filed a complaint.¹⁴

To resolve the transaction-related disputes, we decided to use mediation rather than arbitration and a single mediator rather than a group of mediators.¹⁵ We chose mediation largely because we thought it would be easier to obtain the participation of the second party. Online arbitration projects such as the Virtual Magistrate project¹⁶ have encountered serious problems obtaining cases because respondents have been unwilling to consent to the decisionmaking authority of the arbitrator.¹⁷ In this initial project, we expected no difficulty in obtaining disputes, but we felt that one lesson of online ADR had been that mediation was more likely to be acceptable to parties than arbitration.

¹⁰ See Ethan Katsh, *Online Ombuds Office: Mediation Request Form* (last modified Mar. 4, 1999) <<http://aaron.sbs.umass.edu/ombuds/indexauction.html>>.

¹¹ See *Up4Sale* (visited Feb. 12, 2000) <<http://www.up4sale.com>>. Up4Sale, in February 1999, had about 35,000 items for sale. The eBay site had over 1.5 million items for sale. See eBay, Inc. *About eBay: Press Releases* (visited Feb. 12, 2000) <<http://pages.ebay.com/community.aboutebay/releases/9902.html>>.

¹² See eBay, Inc., *SafeHarbor: Mediation* (visited Feb. 12, 2000) <<http://pages.ebay.com/services/safeharbor/safeharbor-mediation.html>>.

¹³ See *id.*

¹⁴ See *infra* tbl.1.

¹⁵ We are enormously indebted to Mark Eckstein, our online mediator, not only for the expertise he demonstrated in working to resolve these disputes, but also for his insights into the online process.

¹⁶ See Robert Gellman, *A Brief History of the Virtual Magistrate Project: The Early Months* (May 22, 1996) <<http://www.umass.edu/dispute/ncair/gellman.htm>>. The Virtual Magistrate project and online ADR in general are discussed in various papers prepared for the National Center for Automated Information Research Dispute Resolution Conference, held on May 22, 1996. See *NCAIR: Dispute Resolution Conference* (visited Feb. 1, 2000) <<http://www.umass.edu/dispute/ncair>>.

¹⁷ Interview with Robert Gellman, Director of Virtual Magistrate, Washington, D.C. (June 5, 1999).

We chose to use a single mediator rather than a group so that there would be consistency in the style of mediation. In general, the mediator followed a shuttle diplomacy model, keeping the parties apart by managing the communications process via e-mail. We would have preferred to employ software other than e-mail that would have enhanced opportunities for the parties and the mediator to work together, but e-mail appeared to be the online communications process with which the parties were most comfortable, and, as a result, we relied on it almost exclusively. The online mediation process, therefore, was very basic and worked as follows:

- Upon receiving a complaint, the mediator e-mailed the other disputant, provided information about the process of mediation and the project, solicited basic information about the dispute, and inquired about a willingness to mediate.
- Each party then had an opportunity to present his narratives and make claims, demands, or desires known.
- The mediator attempted to distill the basic issues and problems of the dispute. This sometimes required repeated communication exchanges with disputants, generally with the purpose of allowing the mediator to refine the stories and posit certain facts and conditions.
- For most disputes that followed through with this iterative process of communication, a decisional point arose at which one party had to give in or both had to make a compromise. Sometimes this required numerous exchanges; at other times the decisional point presented itself at the outset. The mediator facilitated the information exchanges by providing a buffer, soliciting discussion and responses, and reformulating not only the dispute but also the claims of each party in search of that ground where a deal might be constructed.
- At the decision point, if there was not the necessary movement for determinative resolution, the disputes were considered at impasse and largely left dormant (or to the devices of the parties themselves).

A. Results

As Table 1 indicates, we received 225 complaints. Our principal conclusions were as follows:

Table 1

STATUS OF COMPLAINTS FILED (n=225)			
	Total	Buyer	Seller
Mediated Successfully	50	42	8
Mediated but Impasse	58	47	11
Secondary Party Refuses to Participate	37	32	5
Other	80	55	25
Total	225	176	49

- Of those disputes in which mediation was begun and completed, approximately forty-six percent were resolved to the satisfaction of both parties and fifty-four percent reached impasse. We had begun the project assuming that a fifty percent satisfaction rate would be a desirable goal.
- Approximately three-quarters of the complaints were filed by buyers and one quarter by sellers. Although there are equal numbers of buyers and sellers in the pool of possible complainants (since every transaction has a seller and a buyer), we were not surprised that there was a much higher percentage of buyers than sellers. As will be described later, eBay is an environment in which buyers will feel uncertainty until an item is delivered and in which various mechanisms to reduce uncertainty, such as escrow services, are not used as widely as they might be. Since items are not shipped until a seller receives payment,¹⁸ problems are more likely to be experienced by buyers than sellers.
- The main problems complained of were nondelivery, nonpayment, inability to reach the other party with the item, and damage to reputation. Nondelivery was the most common complaint and the problem with which it was easiest to deal. Reputational issues involved a system of posttransaction feedback ratings established by eBay, and current eBay policy is not to change or remove any feedback posted by a buyer or seller.¹⁹ As a result, our mediator, who, as we shall explain below, was operating in the shadow of eBay law, had no ability to mediate reputational claims.

¹⁸ See generally eBay, Inc., *eBay Rules and Policies* (visited April 9, 2000) <<http://pages.ebay.com/help/community/index.htm>>.

¹⁹ See eBay, Inc., *Leave Feedback About an eBay User* (visited Feb. 12, 2000) <<http://cgi3.ebay.com/aw-cgi/eBayISAPI.dll?LeaveFeedbackShow>>.

- We had assumed that about half the respondents contacted would refuse to participate at all with us, and we were very pleased that the number was considerably lower than that. Excluding the “other” category, which we discuss below, less than twenty-five percent of respondents refused to participate. This figure would be somewhat lower if the “other” category were adjusted, but a high rate of willingness to participate to some extent is a very favorable sign and, as explained below, a significant finding.
- Although 225 complaints were filed, we attempted mediation with only 144. Every pilot project is a learning experience, and if we continue working with these disputes, we would expect to refine the “other” category considerably. Disputants in the “other” category were largely persons who notified us within a day or two that they had resolved their disputes themselves or persons whose complaints had nothing to do with an eBay transaction. We had not anticipated that easy access to a dispute resolution service would be taken advantage of by persons who had disputes with a landlord, who had domain name disputes, and who had a dispute with eBay. A significant part of the “other” group consisted of persons who, in the physical world, might call up a dispute resolution service but not follow through on the advice given or realize that they had called the wrong office. The large number in the “other” category also suggests that ease of access to a court or dispute resolution service will affect the extent of use of the service.

II. MEDIATION AND COMMUNICATION: LOOKING AT THE PRESENT

Mediation often is thought to be a unitary phenomenon when in fact there are many different models and applications of this form of dispute resolution.²⁰ Mediation is practiced on the community level,²¹ in conjunction with courts,²² in educational institutions,²³ within corporations and other

²⁰ See JOHN CONLEY & WILLIAM O'BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* 40 (1998).

²¹ See DANIEL MCGILLIS, U.S. DEP'T OF JUSTICE, *COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC POLICY* 31-32 (1986).

²² See Deborah Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 270 (1986). See generally NATIONAL INST. FOR DISPUTE RESOLUTION, *PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION: REPORT OF THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY* (1983).

²³ See KATHRYN GIRARD ET AL., *PEACEFUL PERSUASION: A GUIDE TO CREATING MEDIATION DISPUTE RESOLUTION PROGRAMS ON COLLEGE CAMPUSES* 6 (1985).

business settings,²⁴ and in federal, state and local agencies.²⁵ While the context for the mediation of disputes varies, all mediation practices are organized around the idea that the mediator's job is to help the parties to tell their story—to help the parties to talk.²⁶ To do this, mediators are trained in the techniques of active listening, remaining impartial, summarizing, reframing, and agreement writing.²⁷ Mediators are trained to “manage” the conversational processes of mediation sessions in a variety of ways.²⁸ They break the process down into specific units such as introductions, joint sessions, caucuses, and private sessions.²⁹ They lay out ground rules that specify when the parties can talk and how they should express themselves. Mediators, in other words, are extremely sensitive to communication, and the richer the process of communication, the richer the tool set the mediator will possess.

Our pilot project was based on the premise that mediators could adapt at least some skills and tactics used in face-to-face practices to the online mediation process. We were, of course, cognizant of the rather poor and restricted set of interactions that are possible with e-mail. Thus, it is encouraging that the mediator achieved settlement rates of almost fifty percent. Yet interviews with the mediator suggest, not surprisingly, that considerable upgrading of online resources could enhance the mediator's capabilities. Consider, for example, the manner in which mediators rely on communication and information management in trying to establish and maintain trust, reframe communications to try to soften positions, facilitate the will and momentum to settle, and bring closure through written (and, occasionally, verbal) agreement.

A. Establishing and Maintaining Trust

While there are certain traditional contexts for mediation, such as consumer and merchant disputes in which the parties do not have a prior

²⁴ See Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 61–66 (1994) (giving examples of mediation in the business setting).

²⁵ See *id.* at 60–61.

²⁶ See generally Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & SOC. INQUIRY 35 (1991).

²⁷ See generally *id.*

²⁸ Sara Cobb, *A Narrative Perspective on Mediation: Toward the Materialization of the “Storytelling” Metaphor*, in NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 48, 59 (Joseph P. Folger & Tricia S. Jones eds., 1994).

²⁹ See *id.* at 58–59.

relationship and do not anticipate a future one, the disputes that arise in the context of eBay are particularly "relationshipless." These buyers and sellers often have engaged in only the transaction that is being contested.³⁰ Nor do these buyers and sellers typically anticipate that they will have a future commercial relationship. These "one-shot" deals make it difficult for the mediator to draw on anything outside of this problematic interaction to help the parties get a different perspective about each other.

These one-shotters come into the online mediation process angry with one another but without knowledge of one another. As a result, the mediator is limited in the questions that might commonly be asked that might create trust in the mediator and in the process and that would create greater comfort zones for the parties. Since there is no relationship from which to draw, the mediator cannot ask about the background of the dispute, i.e., how long the parties have known each other, how other interactions have gone, and other information that would move the parties away from the cycle of accusation and defense. The online medium, at least the e-mail environment, makes it difficult for the mediator to manage or temper the tone of the interactions without sounding controlling and judgmental. The mediator, at least at the beginning, is a disembodied voice and cannot use her own physical "personhood" to set the parties at ease and create an environment for sustained problem-solving. Similarly, absent the physical presence of the disputants, the mediator has difficulty using the intuitive cues of body language, facial expression, and verbal tonality that are part of face-to-face mediation processes.

B. Reframing

Among mediators, there are ongoing debates about the value of reframing. Some argue that reframing, the process through which mediators restate in less accusatory terms the statements of each party, is critical to the mediator's ability to facilitate consensus.³¹ Others argue that reframing can be manipulative and distort the story that the parties want to tell.³² In online mediation, the mediator cannot jump into the narrative process as it

³⁰ See David Mednicoff, *Bidding for Community on the Internet*, ADR ONLINE MONTHLY (Apr. 1999) <<http://128.119.199.27/center/mednicoff.htm>>.

³¹ See, e.g., Christopher W. Moore, *Mediator Communication and Influence in Conflict Management Interventions: A Practitioner's Reflection on Theory and Practice*, in NEW DIRECTIONS IN MEDIATION, *supra* note 28, at 209, 213.

³² See, e.g., Karen Tracy & Anna Spradlin, "Talking Like a Mediator": Conversational Moves of Experiences in Divorce Mediating, in NEW DIRECTIONS IN MEDIATION, *supra* note 28, at 110, 121-22.

unfolds.³³ In addition, responses to e-mails are usually not instantaneous, and given the nature of the medium, being one in which speed is considered paramount, attempts at reframing will only further delay getting back to the other party. In our pilot, the mediator could react only to the statement that each party made in his e-mail. The mediator could, and did, paraphrase and cut and paste sentences as a way of modulating tone and giving certain issues priority. The mediator's efforts here were challenged by the parties' occasional use of highlighting, of coloring certain words and phrases, and of putting certain phrases in capital letters, making it harder for the mediator to temper and reframe these written expressions with a written response.

C. Facilitating the Will to Settle

While bringing people together for a face-to-face discussion often invites them to vent their feelings, the third party usually can assist in creating a civil context for conversation. This can be a more challenging task when one relies only on e-mail. It is less easy for the mediator to speak to the parties simultaneously, and it is more difficult for the mediator to change the feelings or the tone of expression between the parties. Although the mediator did in some instances try to address both parties with one e-mail message that tried to convey to both a way to understand the position of the other party, this technique was only partially successful. In addition, because there are no visual clues to alert the mediator to the emotions of the parties, the mediator cannot gauge their e-mail responses as carefully as he could in face-to-face situations.

In one situation, the buyer, who had filed the complaint, continued to post negative feedback for the seller on the auction site while the mediator was working with both parties to reach a solution. The mediator felt that he was in fact on the verge of a resolution, but the seller had requested a cessation of the negative feedback barrage, and this request was passed on to the buyer, along with the information that they were close to resolving the matter. The mediator had no prior indication that the buyer was so self-righteous about his position that his reaction to the request to discontinue the negative feedback, while negotiations were proceeding, would be for the buyer to exclaim his indignation. As the injured party he felt no compunction to stop the negative feedback and told the mediator that his assistance was no longer wanted because the mediator "just didn't get it." Indeed, it may be

³³ See Joseph P. Folger & Robert A. Baruch Bush, *Ideology, Orientations to Conflict, and Mediation Discourse*, in *NEW DIRECTIONS IN MEDIATION*, *supra* note 28, at 3, 11.

harder to “get it,” that is, to understand what the parties consider to be their best alternative to a negotiated agreement³⁴ and to gain a sense of whether the parties see the mediation process as their best alternative.

D. Agreement

The agreement process in traditional mediation not only expresses the substantive terms of the settlement but also serves as a ceremonial moment in the mediation process. When the parties shake hands, sign an agreement, and get congratulated personally by the mediator, there is both symbolic as well as substantive closure to a mediation. E-mail does not lend itself to these ceremonial moments. As a consequence, it may be harder for the mediator to facilitate a sense of satisfaction among the participants. In addition, in our eBay pilot project, there were no written agreements, a fact that was not necessarily problematic, because in most instances the parties participated in the process in good faith and promptly followed through with the promises they made. However, in other instances, the absence of a written agreement could be problematic because lack of good faith was at the heart of all of these disputes, and to build an agreement on the very things that brought the parties to mediation might leave the mediator with a situation similar to a few we experienced in which the mediator could not know that one of the parties was not participating in good faith. For instance, in one such case, a seller told the mediator that there had been problems with shipping the merchandise because it had been shipped by fourth class mail by mistake. Then the seller told the mediator that the merchandise had been shipped again but was returned because the address was incorrect and asked the mediator to verify the buyer’s address. Then the seller claimed that before he had gotten around to shipping the package, he lost the buyer’s address, and once again asked the mediator for the correct address. The matter was finally resolved, but only after three months of similar delays.

III. MEDIATION AND COMMUNICATION: LOOKING AT THE FUTURE

What should we conclude about mediation taking place in settings in which there is no face-to-face meeting? What should we make of dispute resolution that takes place in a medium not of talk but, at least currently, of the written word? What are the tactics and skills that mediators must master

³⁴ ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97–106 (Bruce Patton ed., 2d ed. 1991).

in order to effectively facilitate the negotiation process in an online environment where information management tools are currently not robust?

Our mediator, simply employing e-mail, had some success even though he had to struggle to structure a relationship with the parties. There was no physical space being shared, but the mediator attempted to stop the cycle of blaming, which is inherent in these disputes, and to deny the participants the ground provided by blaming. The mediator also tried to paint these disputes, where appropriate, as not being "all or nothing" propositions, as situations in which a binary condition as conclusion was not necessarily the only end point, and as scenarios where, perhaps a compromise might result in settlement. Also, in lieu of the fact that participants did not have automatic access to the communication between the mediator and the opposing party, the mediator tried to keep all parties updated on the bulk of the communication. The mediator often would cut and paste one party's communication into a response or query of the other party. This allowed the disputants to feel as if they were being drawn into some sort of triangle and, if nothing else, that they were not alone in this, sitting at home, waiting for the other side to budge.

If a mediator using e-mail felt frustrated, the challenge in the future should be to enhance software with features that will support various mediator styles and create a more fluid environment for the parties and the mediator to work with each other. Cyberspace is an environment of rapid change, and underlying the emergence and acceptance of any new online institution or process will be some new capability for communication and information management. For example, electronic commerce could not flourish until buyers could find an item they wished to purchase, acquire information about the item such as its cost, availability, and terms of delivery, and provide payment in the form of a credit card number. In other words, online commercial transactions required there to be a series of communications between buyer and seller, and only when it became possible for these information transactions to be quick, efficient, and trusted could e-commerce be expected to increase, as indeed it has.

We often categorize online web sites in terms of their physical world counterparts, such as libraries, museums, casinos, malls, auction houses, and others. Each of these "places" also should be understood to be a particular collection of communications processes and patterns. Auctions, for example, involve parties submitting bids (sending information), a machine keeping track of the bids (storing and processing information), informing bidders of the high bid (receiving information), setting a time limit to the process, and notifying the winners and losers. It is software that structures the process of communication in any online institution, and, as will be explained below, it

is software that will allow disputants and third parties to work together more efficiently and that will allow mediators to employ their skills more effectively. If mediation in the online environment currently seems improbable, it should be remembered that auctions and e-commerce in general may, at one time, have seemed just as improbable.

In an environment of rapid change, what is not possible today may be quite possible tomorrow, or what is difficult today may be easy tomorrow. What today's online mediator finds frustrating because a desired action is cumbersome may be handled much more efficiently in the future. Thus, we consider our pilot project to have been significant more for the insights it provides into the desire and need for means for settling online disputes than for determining the likely structure or mechanics of online ADR in the future.

One obvious solution to the lack of face-to-face encounters is to employ video conferencing so that the mediator can see the parties, and if desired, the parties can see each other. There is no reason why a mediator should not use any resource, low technology or high technology, to facilitate communication and resolution. Video conferencing, although currently not a practical alternative for many and not yet a perfected alternative, may indeed be employed usefully in the future. Video conferencing is not, however, likely to be a panacea and a perfect substitute for face-to-face meetings. More importantly, even if it were possible to recreate much of the richness of the physical encounter, the online environment holds open the possibility of providing tools that may enrich the mediator's toolset beyond what is employed offline. It is in the design of such software, used either in online or offline dispute resolution, that the network's long term potential lies.

William Mitchell has written that in cyberspace,

code is the law. The rules governing any computer-constructed microworld—of a video game, your personal computer desktop, a word processor window, an automated teller machine, or a chat room on the network—are precisely and rigorously defined in the text of the program that constructs it on your screen. . . . Does it constrain us unnecessarily or does it allow us to act as we may wish?³⁵

It is easy to forget how influential software is when we use computers since our direct physical contact with keyboard, mouse, and screen is with hardware. "Software[, however,] determines what we interact with, how the

³⁵ WILLIAM J. MITCHELL, CITY OF BITS: SPACE, PLACE, AND THE INFOBAHN 111 (1995).

screen appears, and what options users have.”³⁶ Software can restrict access to information by requiring a password, or it can facilitate access by employing an easy to use and reinforcing interface. It is software that is largely responsible for the fact that, in the words of Joshua Meyrowitz, “media, like physical places, include and exclude participants. Media, like walls and windows, can hide and they can reveal. Media can create a sense of sharing and belonging or a feeling of exclusion and isolation.”³⁷

Looked at in these terms, software can be as important as the mediator, and at times may be more important. The mediator in our pilot project, using e-mail, attempted to apply his experience and expertise to situations that were, in themselves, not extraordinarily novel. If he felt frustration at times, unable to interact with the parties as he might in a face-to-face situation, it is fair to say that part of his frustration was not due to technology per se but to the version of technology that was being used. Face-to-face situations are valuable not simply because the mediator can see what the parties look like but because it is the richest of communications environments. Even if it is not likely that this richness can be duplicated online, it is likely that new software can enrich such interactions considerably and even provide opportunities that are not present in traditional practice.

E-mail allows for the rapid transmission of information. It does not allow for interruptions and various other conversational behaviors that are taken for granted. E-mail has been accepted widely because it is convenient for many purposes in which the principal goal is the movement of information or the simple statement of a position. However, as Donald Norman has written, the key to effective communication is “matching the representation to the task.”³⁸ Further, he writes,

the form of representation makes a dramatic difference in the ease of the task, even though, technically, the choice does not change the problem. . . . The power of a representation that fits the task shows up over and over again. Bad representations turn problems into reflective challenges. Good representations can often transform the same problems into easy

³⁶ M. Ethan Katsh, *Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace*, 1996 U. CHI. LEGAL F. 335, 339.

³⁷ JOSHUA MEYROWITZ, *NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR* 7 (1985).

³⁸ DONALD A. NORMAN, *THINGS THAT MAKE US SMART: DEFENDING HUMAN ATTRIBUTES IN THE AGE OF THE MACHINE* 53 (1993).

experiential tasks. The answer so difficult to find using one mode can jump right out in the other.³⁹

If mediation is to be adaptable to the online environment and if mediators are to have suitable intervention tools, albeit not as powerful as in face-to-face meetings, it is necessary for software to be developed that moves us beyond e-mail.

What features might such software have? Norman's point about "matching the representation to the task" is highly instructive and suggests that if the task is not complex, the software that will be required for a successful intervention can be less powerful. If interventions are looked at in terms of communications processes and patterns, we can, even today, identify problems and processes that are easier than others. Consider the following examples.

A. Negotiations and Blind Bidding

Cybersettle⁴⁰ and Clicknsettle⁴¹ are web-based ventures that allow parties to submit offers for settlement without the offer being revealed to the other party.⁴² Offers are submitted over a network to a machine that calculates whether the offers are within a certain range.⁴³ The parties agree ahead of time that if the offers are within a certain range, the dispute will end by splitting the difference.⁴⁴ When the offers are far apart, the machine keeps the offers secret and negotiations can continue without anything having been given up by the parties.⁴⁵

This process is based on software that manages a communications process (parties send information to the machine, but only receive information back that indicates whether an offer falls within range or not) and performs an extraordinarily simple set of calculations. It is also a process that can be extraordinarily useful, particularly in some disputing arenas, such as insurance company and claimant disputes, in which the disagreement is over money and where settlement out of court always has

³⁹ *Id.* at 55.

⁴⁰ See *Cybersettle.com* (visited Apr. 13, 2000) <<http://www.cybersettle.com/about/main.htm>>.

⁴¹ See *Clicknsettle.com* (visited Apr. 13, 2000) <<http://www.clicknsettle.com/howitworks/cfm>>.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

been expected. Since August 1988, according to cofounder James Burchetta, over five thousand disputes involving more than twenty million dollars worth of claims have been settled in this manner by Cybersettle.⁴⁶ Interestingly, a version of blind bidding underlies the eBay environment, an environment in which dispute resolution occurs as an outcome decided by public and private bids submitted by the “disputants.”

B. Arbitration

Arbitration is a much less complex communications process than mediation, and therefore, development of software to arbitrate online disputes is much less of a challenge than developing software that would support mediation. In its most elementary form, arbitration can be looked at as involving the transmission of information, the storing of information, and the reviewing and processing of information by an arbitrator. These are familiar tasks and one of the attractions of online arbitration, aside from its finality, is that it is a more manageable communications process and a process in which existing software can be adapted for use.

When the Internet Corporation for Assigned Names and Numbers (ICANN) authorized a new framework for registering domain names, it also set up a new process for resolving disputes involving domain names.⁴⁷ ICANN has a dispute resolution policy and is in the process of accrediting dispute resolution providers to resolve disputes.⁴⁸ There probably will be several dispute resolution providers, all of whom will be required to arbitrate disputes. These will be handled as arbitrations in a manner similar to arbitrations involving the submission of written materials.⁴⁹ In this context, each provider may employ its own software, but the form of the software probably will be fairly similar since the structure of the process does not call for very complex interactions.

⁴⁶ See *Cybersettle.com* (visited Feb. 19, 2000) <http://www.cybersettle.com/press_releases/lead_release.htm>.

⁴⁷ See *ICANN* (visited Apr. 13, 2000) <<http://www.icann.org/udrp/udrp.htm>>.

⁴⁸ See, e.g., ICAAN, *Uniform Domain Name Dispute Resolution Policy* (visited Apr. 13, 2000) <<http://www.icann.org/udrp/udrp-policy-24oct99.htm>>; see also ICAAN, *Approved Providers for Uniform Domain Name Dispute Resolution Policy* (visited Apr. 13, 2000) <<http://www.icann.org/udrp/approved-providers.htm>>.

⁴⁹ See, e.g., eResolution, *Domain Name Arbitration* (visited Apr. 13, 2000) <<http://www.eresolution.ca/services/dnd/arb.htm>>.

C. Future Directions

At the heart of software to facilitate mediation will be capabilities to organize a conversation and conduct a rich exchange of information. Online mediation is, like offline dispute resolution, a group process, and its attraction and perceived viability will increase as current group management and communication tools are improved. The appeal of the Cybersettle and Clicknsettle software is that it allows for an exchange of information in a manner that can be cumbersome offline, but is predictably efficient online. While online mediation generally may never compare favorably with face-to-face, there certainly will be online tools that allow for collaboration and consensus building in ways that are not possible today. These tools, like the blind bidding employed by Cybersettle and Clicknsettle, may even find uses in offline mediations.

One of the drawbacks of e-mail is its reliance on text. Any mediator relying exclusively on e-mail will be engaged in a time consuming task, since reading many e-mails and composing many e-mails is labor intensive. Forum or conferencing software⁵⁰ that allows for threaded conversations provides a degree of organization that is lacking with e-mail. Yet, the threads of any conversation also will be textual. We are, in a way, at a beginning point in empowering mediators, using the computer for very elementary blind bidding and negotiation and using text for almost everything else. The path of the future is likely to be one where the limited machine intelligence that supports blind bidding grows, reliance on text decreases, and data manipulation and communication using new tools increase.

Software generally acquires new functions and becomes easier to use as new versions of it are developed. We already have some powerful negotiation software, such as OneAccord,⁵¹ which has sophisticated information processing capabilities, and future versions may prove more widely useable than the current version. OneAccord allows parties to identify their interests and assess their priorities.⁵² The software allows the machine to assimilate the information presented by the parties and calculate resolutions that may provide each side with more than they themselves might be able to negotiate.⁵³ This is software that allows information to be entered by parties and allows the machine to make suggestions based on its

⁵⁰ See, e.g., *O'Reilly WebBoard* (visited Apr. 13, 2000) <<http://www.webboard.oreilly.com>>.

⁵¹ See *OneAccord* (visited Apr. 13, 2000) <<http://www.oneaccordinc.com>>.

⁵² See *id.*

⁵³ See *id.*

calculations. It is an example of the type of software which takes advantage of the computing power of the machine and of which we shall see more.⁵⁴

Another route to moving beyond text when interests and positions need to be assessed and communicated is to employ more visual displays of information. Hand-drawn diagrams on whiteboards are useful and not uncommon in face-to-face sessions, but computer-facilitated charts, figures, graphs, scales, tables, diagrams, pictures, images, maps, and colorful and animated graphics can represent information in ways that are not frequently seen.

Visual communication, like text, can be employed in an enormously varied and flexible manner.⁵⁵ Pictures can be realistic and functional, or impressionistic and abstract. They can be garish or subtle, and as varied in tone and style as text. They can be formal or informal. They can accompany text and serve as an illustration of text, or they can be communicative by themselves. They can be static, as when they appear on the printed page or, in an electronic era, they can be moving and animated.

"We catch on fast," Pamela McCorduck has noted, "when someone draws us a picture."⁵⁶ Effective visual communication may, at times, employ sophisticated technology, or it may involve a relatively simple arrangement of information. We have some elementary indications of the potential of visual communication in presentation software like PowerPoint, and in the provision of templates and the use of wizards, we can understand how the creation of effective design might even be guided by the software itself. It is, however, as computer scientist Marshall Brain has commented, "hard to have graphical dreams in a textual world."⁵⁷ Designing software that will be of value to mediators is a challenge and, as is customary with software, version one is not likely to employ the ideal model.

While it is hard to describe how such software might work, it is not difficult to identify what functions such software would serve.⁵⁸ Consider some of the following possibilities:

⁵⁴ See generally, e.g., STEVEN BRAMS & ALAN TAYLOR, *THE WIN-WIN SOLUTION GUARANTEEING FAIR SHARES TO EVERYBODY* (1999).

⁵⁵ See generally EDWARD R. TUFTE, *ENVISIONING INFORMATION* (1990); EDWARD R. TUFTE, *THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION* (1983); EDWARD R. TUFTE, *VISUAL EXPLANATIONS* (1997).

⁵⁶ Pamela McCorduck, *How We Knew, How We Know, How We Will Know*, in *LITERACY ONLINE: THE PROMISE (AND PERIL) OF READING AND WRITING WITH A COMPUTER* 245, 253 (Myron C. Turman ed., 1992).

⁵⁷ Marshall Brain, *Stop Bit: Hidden Persuaders*, *BYTE*, Apr. 1992, at 368, 368.

⁵⁸ Opportunities for using the visual capabilities of electronic media in law-related processes are discussed in ETHAN KATSH, *LAW IN A DIGITAL WORLD* 145-71 (1995).

- Use objects on the screen to represent how far apart the parties are and whether there has been any movement.
- Use changes in color or in the size of various shapes to track preferences or other variables of interest over time.
- Depict choices and the relationship among choices in flow charts.
- Allow selections to be made and feelings to be communicated as much as possible in ways other than typing in text, for example, by using a mouse to highlight, drag, or manipulate objects.

It never will be possible to avoid text altogether, and there is no reason even to work toward such an end. It is, however, possible to develop visual mechanisms to clarify and display changes over time, show comparisons, and reveal relationships. It should be possible to identify each of the manifold ways in which mediators manage and communicate information and to see whether these tasks and strategies can be facilitated by using the computing power behind the screen and the display of information and data on the screen. There are, quite clearly, some things that humans are better at than machines. It is also clear, however, that there are an increasing number of informational tasks where the machine is currently gaining on the human and, at some point, may surpass the human.

IV. "EBAY LAW"

One hundred forty-four disputes arising out of online auction transactions during a two week period⁵⁹ may seem to indicate a highly troubled environment. When one considers that there were probably over a million transactions completed during this period of time, the number of complaints filed suggests a rather low level of disputing relative to the overall number of transactions. Our data do not really allow us to be confident about the level of disputing at eBay. There were, undoubtedly, parties in dispute who were unaware of our service, and there were certainly many disputes that were resolved by the parties themselves through online negotiation. What is clear to us is that online environments are constructed environments, and the manner in which they are constructed will affect the level of disputing and the need for dispute resolution services.

When millions of transactions are taking place in short periods of time, it is inevitable that disputes will occur. As e-commerce grows, the level of transactions will grow, and the number of disputes occurring also will

⁵⁹ See *supra* tbl.1.

increase.⁶⁰ There is, in other words, reason to believe that dispute resolution systems and services are needed online, but it is not yet clear what caseloads might look like. As the need for online ADR is recognized, and as online dispute resolution is perceived to present commercial opportunities, we will be faced not only with how to design appropriate systems and what goals and values should govern design, but where these dispute resolution systems should be.

Asking where an online dispute resolution institution should be in cyberspace is, in some ways, an odd question. There are no differentiated spatial regions in cyberspace. Networks make distance less important than it used to be, and a major attraction of the Internet is that it is possible to do more and more things anywhere from any place. Indeed, since it is the act of accepting a basic communications protocol that allows one to become part of and share information on the Internet,⁶¹ the idea of cyberspace as a single, even if nonuniform, large entity is not unreasonable.

While conformance to a particular communications protocol gives the Internet an identity as "the Internet," software code also allows individual online entities to differentiate themselves and acquire their own identities. As Lawrence Lessig notes in his recent book,

cyberspace is not *a* place; it is many places. Its places don't have one nature; the places of cyberspace have many different "natures." These natures are not given, they are made. They are set (in part at least) by the architectures that constitute these different spaces. These architectures are themselves not given; these architectures of code are set by the architects of cyberspace—code writers.⁶²

This partitioning of cyberspace can be seen at many levels. Most generally, there are different domain name categories such as ".com," ".org," or country codes that provide, in many cases, an indication of whether a concern is commercial or not, or U.S.-based or not. More importantly, software controls the range and patterns of interactions that are possible within a site and, by doing so, makes us comfortable with calling such sites libraries, casinos, malls, auction houses, or museums. In structuring a user's relationship with a site, software establishes default behaviors and a range of permitted behaviors. It allows, in the auction environment, for one to choose to be seller or buyer and for permission to use the site, or even enter it, to be

⁶⁰ See Ethan Katsh, *Dispute Resolution in Cyberspace*, DISP. RESOL. MAG. (forthcoming 2000).

⁶¹ See generally CRAIG HUNT, TCP/IP NETWORK ADMINISTRATION (2d ed.1998).

⁶² LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 82 (1999).

conditioned upon responses to questions asked by the site owner.⁶³ Finally, it is software that allows us to foresee effective dispute resolution systems online, and it is software that provides us with the capability to design such services either as a service for cyberspace at large or for the particular use of some entity or entities.

There may, ultimately, be an overarching and indigenous law of cyberspace and a range of generally accessible legal institutions and processes. There is an energetic debate among cyberlaw experts as to whether we need a separate legal jurisdiction of cyberspace or whether laws of physically based countries and states can be adapted to cover whatever legal issues arise online.⁶⁴ It will be interesting to see which of these points of view prevails, but in the interim, online legal cultures containing what might be considered to be legal doctrine and legal processes already are emerging in many online "places."

A major challenge in creating a legal system for cyberspace is to achieve consensus among online participants and to deal with resistance by offline governmental entities that might think they are giving up sovereign authority.⁶⁵ This is not likely to be a short term project. For individual online entities or, indeed, for groups of online entities, to establish a dispute resolution process that may even carry their brand(s) is not inconsistent with

⁶³ "The same technologies that can be used to propagate information can also build fences around it." Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1093 (1998). Johnson and Post note that "[w]hile these electronic communications play havoc with geographical boundaries, a new boundary, made up of the screens and passwords that separate the virtual world from the 'real world' of atoms, emerges." David R. Johnson & David G. Post, *The Rise of Law on the Global Network*, in BORDERS IN CYBERSPACE 37, 52 (Brian Kahin & Charles Nesson eds., 1997).

⁶⁴ The arguments are presented most lucidly in Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); Jack L. Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI.-KENT L. REV. 1119 (1998); and David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

⁶⁵ Professor Reidenberg notes that

[i]n addition to the new geography of borders, networks may now supplant even substantive, national regulation with their own rules of citizenship and participation. Networks themselves take on political characteristics as self-governing entities; networks determine the rules and conditions of membership Like nation states, network communities have significant powers to enforce rules of participant conduct.

Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, in BORDERS IN CYBERSPACE, *supra* note 63, at 84, 90–91.

the long term goal of constructing a more broadly accessible online legal process. To have smaller and widely distributed dispute resolution entities is much less ambitious, but it is also much more easily achievable.

There are several reasons why it makes sense for individual marketplaces to have a dispute resolution process associated with them.

First, many of the practical considerations that are contributing to the extraordinary growth of online institutions generally also apply to the building of dispute resolution additions onto such sites. When the raw material of an institution is software rather than bricks and mortar, bits rather than atoms,⁶⁶ construction costs and costs of modification are likely to be reduced. When delivery can occur at electronic speed rather than at the speed of automobile or airplane, it will occur both faster and at a cheaper cost. In addition, a service can appear to be located within a site even though it is an outsourced service managed by someone else. Ease of access and use is not affected when a service can be integrated seamlessly into a site.

Second, when processes can be automated and when successful structures can be replicated at virtually no cost, dispute resolution providers can grow, like any other online business, by copying successes and enjoying economies of scale.

Third, context matters. In the marketplace-centered dispute resolution system, expertise can be imported from anywhere. But how can participation be encouraged and enforcement, when necessary, be carried out? There is no sovereign authority to compel appearance, payment, or other acts of participation. In the absence of the sovereign that usually can compel submission to a legal process, it is possible to take advantage of the context of the particular marketplace and the rules for participating in the marketplace. The disputants' relationship to this marketplace can, as will be explained below, often serve as a substitute for the coercive power of the state.

V. ADR IN THE SHADOW OF EBAY LAW

The business model of most online auctions is that the site owner, in this instance eBay, assumes no responsibility for the transaction between bidder and seller.⁶⁷ eBay charges a small fee when a seller lists an item and charges an additional fee if the item is sold, but otherwise eBay does not participate

⁶⁶ See NICHOLAS NEGOPONTE, BEING DIGITAL 11 (1995).

⁶⁷ See eBay, Inc., *User Agreement* (visited Apr. 13, 2000) <<http://pages.ebay.com/help/community/png-user.html>>.

at all after the auction has been concluded.⁶⁸ What this means is that sellers, usually individuals or small businesses, and buyers are inevitably strangers to each other. They live at a distance from each other and, while a picture of the item may appear online, they have no ability to feel or try out the item being sold.

As we encountered disputants and observed them as they participated in our process, we began to see eBay not from eBay's perspective, which assumes that eBay is the equivalent of a landlord with little power over how a transaction is finalized, but from its users' perspective. The more we saw of this, the more we became persuaded that disputants were, indeed, participating as if they were "in the shadow of the law."⁶⁹ The law whose shadow was affecting them, however, was eBay's law rather than the shadow of any other law. It may be that the most significant statistic generated in our pilot project was that about three quarters of respondents were willing to participate in our process. Granted, mediation was explained to respondents to be a voluntary process in which they could leave at any time. Yet, our experience generally during the past three years had been that, with the same explanation, the likelihood of a respondent being willing to work with us was no higher than fifty percent.

Why would most eBay users be willing to participate with us? Whether or not they actually wished to reach a mutually acceptable outcome, they typically had concerns about further participation and involvement in eBay and about how the dispute might affect their future in eBay. eBay was important to them, and eBay ran its site in such a way that a user's eBay future could be affected by disputes that arose. If they ignored eBay law, they did so at some risk to their future online life and even to their economic wellbeing.

eBay law, like much of law, begins with a concern for "public safety."⁷⁰ Safety in the eBay context means not physical safety but safety from a series of harms or losses that one might encounter there. eBay, like other online marketplaces, needs to be perceived as a place where risk of loss is low and trust in the process working as advertised is high. eBay needs to address public safety concerns because a marketplace in which offers to sell are

⁶⁸ See *id.*

⁶⁹ Cooter et al., *supra* note 8, at 225.

⁷⁰ See Julian Dibbel, *A Rape in Cyberspace: How an Evil Clown, A Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database into a Society* (visited Apr. 13, 2000) <http://www.levity.com/julian/bungle_vv.html> (discussing what may still be the most intriguing tale of "public safety" in cyberspace); see also Jennifer Mnookin, *Virtual(ly) Law: The Emergence of Law in LambdaMOO* (visited Apr. 13, 2000) <<http://www.ascusc.org/jcmc/vol2/issue1/lambda.html>>.

made by persons with uncertain identities and no reputations is likely to be a high risk and low trust environment in the extreme. If one could not predict that auctions and transactions would occur according to expectations, the marketplace would not thrive.

eBay's response to this public safety problem was not to install a police force to deal with problems after they occurred but to use an information process to try to prevent disputes from occurring.⁷¹ Since the public safety problem largely focused on unknown and perhaps untrustworthy sellers and buyers, eBay put in place a process for sellers and buyers to acquire reputations as trustworthy parties.⁷² After any transaction is completed, buyers and sellers may post feedback as to the conduct of the buyer or seller. The "feedback rating" system is a software-supported reputational system, and anyone's feedback rating is accessible from the page advertising any item for sale.⁷³ Checking on a seller's feedback rating is probably the first step any user takes before considering whether to bid on an item, and acquiring a positive feedback rating is thus highly important. Protecting one's feedback rating looms large in any eBay user's mind. As one guidebook to eBay points out, "on eBay, all you have is your reputation."⁷⁴

As noted above, eBay generally does not assume any responsibility for transactions. It does, however, make available some resources for reducing risk.

- One can pay a fee to an escrow service and allow the escrow service to hold payment until the item arrives and the buyer is satisfied.⁷⁵ This is not a service that appeared to us to be used as widely as it might be.
- There is one risk-reducing service actually offered by eBay: insurance for items that cost under \$200. There is a twenty-five dollar deductible for any claims, making the insurance more valuable for items closer to \$200 than to twenty-five dollars, and there is a thirty-day waiting period and several other conditions that must be met before a user can obtain reimbursement.⁷⁶

⁷¹ See eBay, Inc., *Feedback Forum* (visited Apr. 13, 2000) <<http://pages.ebay.com/services/forum/feedback.html>>.

⁷² See *id.*

⁷³ See eBay (visited Apr. 13, 2000) <<http://pages.ebay.com/services/safeharbor/safeharbor-forum.html>>.

⁷⁴ ROLAND WOERNER ET AL., *EBAY FOR DUMMIES* 326 (1999).

⁷⁵ See eBay (visited Feb. 4, 2000) <<http://pages.ebay.com/services/safeharbor/safeharbor-escrow.html>>.

⁷⁶ See eBay, Inc., *Services: Insurance Process* (visited Apr. 13, 2000) <<http://pages.ebay.com/help/community/ins-process.html>>.

- At a future date, it would not be surprising if the use of credit cards⁷⁷ was facilitated in some way and if some additional information about the identity of users was made available.⁷⁸ Credit cards are the safest way to pay for items since issuing banks generally will remove a charge if the buyer has a problem with the item.⁷⁹ Providing ways to verify the identity of users would not be difficult for eBay, but it would raise various privacy issues.

Access to a dispute resolution service is consistent with this model of making services available that can be employed to reduce risk and build some trust. There is no guarantee that dispute resolution will be successful, but if sellers and buyers are willing to use such a service, which our data suggest they are likely to do, providing recourse to such a service would seem to make considerable sense to online marketplaces.

Without steps taken by eBay to build and affirm identity and reputation, crucial elements of trust would be lacking. In physical space, Lessig notes, "much about your identity is revealed whether you want it revealed or not. Many of the facts about you, that is, are *automatically asserted* and *self-authenticating*. This is a fact about real-space life . . . Identity and authentication in cyberspace are different."⁸⁰ The less of a buyer's human persona that is automatically available to sellers, the more necessary it is for the marketplace that wants to build trust to put in place mechanisms that do create persona. While online auctions try to limit potential liability by creating distance between the auction site and those doing business in the auction site, the site owners are the designers and administrators of the process of creating identities and establishing reputations. This is a formidable power and, while it might appear that the auction site owners are merely making a process available and then letting users employ it, there are terms and conditions governing these data collection and data distribution

⁷⁷ See *Billpoint* (visited Feb. 4, 2000) <<http://www.billpoint.com/help/pilotfaq.html>>; see also *Billpoint* (visited Feb. 4, 2000) <<http://www.billpoint.com/help/buyerguide/new.html>>.

⁷⁸ See eBay, Inc., *Services: Rules & Safety Overview (Safeharbor)* (visited Feb. 4, 2000) <<http://pages.ebay.com/help/community/escrow.html>>.

⁷⁹ See, e.g., AMERICAN EXPRESS, CREDIT CARD ADVERTISEMENT PAMPHLET 2 (2000) (offering a "Purchase Protection Plan" covering items purchased with an American Express credit card against "accidental damage and theft" under certain circumstances).

⁸⁰ LESSIG, *supra* note 62, at 31–32.

processes, and these rules are made and administered by eBay and other proprietors of auction sites.⁸¹

A somewhat less obvious eBay law or legal process concerns the power of exclusion, a power that, in the context of eBay, is a power over existence.⁸² This may not be a power that often is exercised, but for it to have effect, it is less necessary that it be used than that buyers and sellers are aware that it could be used. In our pilot project, where mediation was the sole process used, participants had no reason to fear being evicted from the marketplace. A marketplace could, however, rely on an arbitration process rather than mediation and use the threat of exclusion as the mechanism for enforcing the terms of the ruling.

As we observed the interaction of the parties to disputes arising out of eBay transactions, we increasingly felt that eBay could be considered to be a jurisdiction in itself, a legal authority in itself, an entity that might even be considered to be able to exercise a loosely defined sovereign power over at least one aspect of many individuals' online lives. As we considered where online dispute resolution resources might be located in the future, and as we thought about ADR being conducted "in the shadow of the law," we were increasingly persuaded that the most relevant and powerful law probably was eBay's law and the power it exercised as a result of users agreeing to the terms and conditions for participation that eBay presents to them.⁸³ Disputants, without any formal action from eBay, participated with us at a very high rate because eBay law extended, in some way, beyond the confines of eBay. There may have been other laws casting shadows on our process, but federal law or recourse to any court system rarely was mentioned.

Since the entrance and participation of users is governed by contract,⁸⁴ terms and conditions for participation in dispute resolution could be included in the contract. The obstacle that has frustrated most online ADR projects thus far is that there has been no sovereign authority that could compel any party to appear and participate. This is a power that marketplace owners do have, since parties that refuse to participate and abide by decisions could be threatened with exclusion. Even in the absence of specific contractual agreements, repeat participants in a marketplace will not want to be identified as problem users in any way, something that data collection capabilities make possible for marketplace owners.

⁸¹ See, e.g., eBay, Inc., *User Agreement* (visited Apr. 13, 2000) <<http://pages.ebay.com/help/community/png-user.html>>.

⁸² See *id.*

⁸³ Cooter et al., *supra* note 8, at 225.

⁸⁴ See eBay, Inc., *User Agreement* (visited Apr. 13, 2000) <<http://pages.ebay.com/help/community/png-user.html>>.

The ability to compel participation need not suggest that these marketplaces actually do have anything approaching sovereign power.⁸⁵ They do, however, possess market power, and they contain, in the words of David Post, “rule-sets” that users can choose to join or not.⁸⁶ Post feels that our activity online consists of entrances and exits to a variety of “rule-sets,” and he writes that online entities,

rather than territorially-based states, become the essential units of governance; users in effect delegate the task of rule-making to them—confer sovereignty on them—and choose among them according to their own individual views of the constituent elements of an ordered society. The “law of the Internet” thus emerges, not from the decision of some higher authority, but as the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join. Mobility—our ability to move unhindered into and out of these individual networks with their distinct rule-sets—is a powerful guarantee that the resulting distribution of rules is a just one; indeed, our very conception of what constitutes justice may change as we observe the kind of law that emerges from uncoerced individual choice.⁸⁷

This seems an accurate analysis and, if so, it should not be surprising if, as competition among these “rule-sets” occurs, it is seen to be desirable to establish processes to deal with problems arising under the rules and behavior in such communities.

Online marketplaces are environments in which there is law, authority, and power, and in which there are also disputes. These are also, intriguingly, environments into which expertise can be delivered even if those possessing the expertise are physically located elsewhere. In the physical world, and particularly for institutions managed by the state, it is most efficient for courts to be located in one place that might be accessible to those in a geographical area. In cyberspace, expertise can be brought to anywhere from anywhere.

One consequence of such a situation is that marketplaces with law and power easily can have their own mechanisms of dispute resolution. They can have courts or they can have less formal institutions, and the manner in which disputes are dealt with can even be an issue marketplaces might consider as they compete with others. Indeed, the word “court,” if it suggests a court of law, may be too narrow a construction of the term and a

⁸⁵ See generally WALTER WRISTON, *THE TWILIGHT OF SOVEREIGNTY* (1992) (analyzing the problems of sovereignty in a digital world).

⁸⁶ David Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 167 (1992).

⁸⁷ *Id.*

construction too tied to physical space. We have historical precedent for courts being located in places other than courthouses, such as manor courts in the Middle Ages⁸⁸ or even courts associated with marketplaces.⁸⁹ If it is possible to consider the court not as a building or physical place, but as a set of processes oriented around the resolution of disputes, the location of courts in particular online marketplaces should be desirable.

Whether we call these virtual entities courts or something else, they probably represent significant dispute resolution entities of the future. There are several projects around the country that have produced courtrooms of the future. These projects emphasize the use of technology in a physical place. Yet, the most imaginative courtrooms of the future, and perhaps even those that will be most in demand, may not be in any of these physical courtrooms but in cyberspace. And if they are in cyberspace, embedded in software, their structures and processes can be replicated and, like other software, improved and enhanced.

Cyberspace is an arena of experimentation and competition. It is not now, and probably never will be, a harmonious place, but it is a place of rapid change and, even today, of extraordinary achievements. The emergence of effective online justice systems will require considerable creativity, but the larger and more active cyberspace becomes, the more likely it is that demand for online ADR will grow. It has been written that "businessmen want to *do* business, not argue about it. But in the world of trade and commerce, disputes are inevitable."⁹⁰ In the online environment, loss of time often causes loss of opportunities, and persons involved in electronic commerce or any type of online relationship will wish to resolve problems in the fastest possible way.⁹¹ ADR traditionally has been a process of choice when relationships are of concern, and in Margaret Wertheim's words, cyberspace is a "*network of relationships*"⁹² and is "inherently relational."⁹³ As a result, online ADR, employing increasingly sophisticated

⁸⁸ See G.G. COULTON, *MEDIEVAL VILLAGE, MANOR, AND MONASTERY* 65 (1925).

⁸⁹ See Laura Nader, *Styles of Court Procedure: To Make the Balance*, in *LAW IN CULTURE AND SOCIETY* 69, 74–75 (Laura Nader ed., 1969) (describing the prompt resolution of a market dispute).

⁹⁰ AMERICAN ARBITRATION ASS'N, *A BUSINESSMAN'S GUIDE TO COMMERCIAL ARBITRATION* 3 (1964).

⁹¹ See JAMES GLEICK, *FASTER: THE ACCELERATION OF JUST ABOUT EVERYTHING* 83 (1999); MICHAEL LEWIS, *THE NEW NEW THING: A SILICON VALLEY STORY* (2000) (discussing "Internet time").

⁹² MARGARET WERTHEIM, *THE PEARLY GATES OF CYBERSPACE* 299 (1999).

⁹³ *Id.*

tools provided by the network, can be expected to be a resource of growing value.